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1992 Fund Executive Committee	92EC48 •
1992 Fund Working Group	92WG6/1

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

PRESTIGE

Note by the Director

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary of the incident so far:	The Bahamas-registered tanker <i>Prestige</i> broke in two and sank some 260 kilometres west of Vigo (Spain). Approximately 63 200 tonnes of heavy fuel oil were spilled. The oil had a significant impact on fisheries, aquaculture and tourism businesses in Spain and France. Extensive clean-up and preventive measures were carried out in Spain and France. Some preventive measures were also carried out in Portugal. The shipowner's P&I insurer, London Steamship Owners' Mutual Insurance Association Ltd (London Club), and the 1992 Fund established Claims Handling Offices in La Coruña (Spain) and Lorient (France). Legal proceedings have been initiated in Spain (section 6) and in France (section 7). A court action was also initiated in the United States by the Spanish State against the American Bureau of Shipping (ABS), the classification society that certified the <i>Prestige</i> (section 9). In March 2009, the Criminal Court in Corcubión, which was investigating the cause of the incident, issued a decision declaring the instruction of the case as concluded. In the decision, the Court exonerated from liability the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain and decided to continue the proceedings against the Master, Chief Officer and Chief Engineer of the <i>Prestige</i> .
Recent developments:	The claims situation in Spain and France is summarised in sections 3, 4 and 5. The process of assessing claims both in Spain and France continues. In October 2009, the Court of Appeal in La Coruña (Audiencia Provincial) overturned the Criminal Court's decision and ordered the Court to reinstate the proceedings against the civil servant involved in the decision not to allow the ship into a place of refuge in Spain. In May 2010 the Criminal Court declared the instruction of the case as concluded. It is expected that the hearing on the criminal and civil merits of the case will commence later in 2010 or in 2011 (section 6.1) Regarding civil liabilities, in January 2010 the experts appointed by the Criminal Court in Corcubión to examine the civil claims lodged in Court

submitted their report. The experts engaged by the 1992 Fund are examining the report (section 6.3).

A judgement was issued by a French court in respect of a claim submitted by the operator of two hotels and a spa (section 8).

Action to be taken: 1992 Fund Executive Committee:

Information to be noted.

1 Summary of incident

Ship	<i>Prestige</i>
Date of incident	13.11.02
Place of incident	Spain
Cause of incident	Breaking and sinking
Quantity of oil spilled	Approximately 63 200 tonnes of heavy fuel oil
Area affected	Spain, France and Portugal
Flag State of ship	Bahamas
Gross tonnage (GT)	42 820 GT
P&I insurer	London Steamship Owners' Mutual Insurance Association Ltd (London Club)
CLC Limit	€2 777 986
STOPIA/TOPIA applicable	No
CLC + FC Limit	€171 520 703
Compensation	
Level of payments	15%/30% subject to conditions
Spain	Two payments to the Spanish Government totalling €15 million minus €1 million, subject to: <ul style="list-style-type: none"> • Bank guarantee • Undertaking to pay all claimants in Spain
France	Level of payments at 30% subject to the French Government standing last in the queue.
Portugal	Payment to Portuguese Government of €328 488, corresponding to 15% of the assessment of its claim for preventive measures. A further payment to the Portuguese Government would be made in the event that the 1992 Fund Executive Committee were to increase the level of payments unconditionally.
Outstanding claims	
Spain	Some 245 claims are awaiting a reply from the claimant.
France	28 claims are being assessed.
Portugal	None.
Legal proceedings	
Spain	In conjunction with an investigation into the cause of the incident, criminal proceedings have been brought against the Master, Chief Officer and Chief Engineer of the <i>Prestige</i> and a civil servant involved in the decision not to allow the ship into a place of refuge. Some 2 360 claims for compensation have been submitted into the proceedings.
France	Civil proceedings have been brought in various French courts (232 actions).
Portugal	Legal proceedings were started but discontinued after settlement with the Portuguese Government.
United States	A court action has been brought by the Spanish State against ABS, the classification society that certified the <i>Prestige</i> .

2 The incident

- 2.1 On 13 November 2002 the Bahamas-registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 63 000 tonnes of cargo. Over the following weeks, oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 800 tonnes of cargo remained in the wreck.
- 2.2 Due to the highly persistent nature of the *Prestige*'s cargo, released oil drifted for extended periods with winds and currents, travelling great distances. The west coast of Galicia (Spain) was heavily contaminated and oil eventually moved into the Bay of Biscay, affecting the north coast of Spain and France.
- 2.3 Major clean-up operations were carried out at-sea and onshore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at-sea were undertaken off the coast of Portugal.
- 2.4 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association Ltd (London Club).
- 2.5 Between May and September 2004, some 13 000 tonnes of cargo were removed from the fore part of the wreck. Approximately 700 tonnes were left in the aft section.
- 2.6 For details of the clean-up operations and the impact of the spill, reference is made to the Annual Report 2003 (pages 106-109).
- 2.7 For details of the investigations into the cause of the incident, reference is made to the Annual Report 2005 (pages 116-121).

3 Claims for compensation

3.1 Spain

- 3.1.1 As at 7 May 2010, the Claims Handling Office in La Coruña had received 844 claims totalling €1 020.7 million. These include 14 claims from the Spanish Government totalling €968.5 million. The table below provides a breakdown of the different categories of claims:

Category of claim	No. of claims	Amount claimed €
Property damage	232	2 066 103
Clean up	17	3 011 744
Mariculture	14	20 198 328
Fishing and shellfish gathering ^{<1>}	180	3 610 886
Tourism	14	688 303
Fish processors/vendors	299	20 838 322
Miscellaneous	74	1 775 068
Spanish Government	14	968 524 084
Total	844	1 020 712 838

^{<1>} One claim totalling €132 million from a group of 58 associations has been withdrawn following a settlement with the Spanish Government.

3.1.2 As at 7 May 2010, 794 (95.66%) of the claims other than those of the Spanish Government had been assessed for €3.9 million. Interim payments totalling €527 327 (£461 991)^{<2>} had been made in respect of 173 of the assessed claims, mainly at 30% of the assessed amount. Two hundred and forty-five claims are awaiting a response from the claimant. Three hundred claims (totalling €29.9 million) have been rejected and 19 have been withdrawn by the claimants.

3.2 France

3.2.1 As at 7 May 2010, 482 claims totalling €109.7 million had been received by the Claims Handling Office in Lorient. This includes the claims by the French Government totalling €67.5 million. The table below provides a breakdown of the different categories of claims:

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean up	61	10 512 569
Mariculture	126	2 336 501
Shellfish gathering	3	116 810
Fishing boats	59	1 601 717
Tourism	195	25 166 131
Fish processors/vendors	9	301 446
Miscellaneous	19	2 029 820
French Government	1	67 499 154
Total	482	109 651 920

3.2.2 Of the 482 claims submitted to the Claims Handling Office, 94% had been assessed by 7 May 2010. Four hundred and fifty-four claims had been assessed for €8 million and interim payments totalling €5 million had been made at 30% of the assessed amounts in respect of 358 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Seventy-three claims totalling €3.8 million had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident. Three claims totalling some €6 000 have been withdrawn by the claimant.

3.2.3 Sixty-one claims, totalling €10.5 million, have been submitted by local authorities for costs of clean-up operations. Sixty of these claims have been assessed at €4.6 million. Interim payments totalling €1.2 million (£1.1 million) have been made in respect of 45 claims at 30% of the assessed amounts.

3.2.4 One hundred and twenty-six claims, totalling €2.3 million, have been submitted by oyster farmers for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund have examined these claims and 120 of them, totalling €2.4 million, have been assessed at €468 231. Payments totalling €131 955 have been made in respect of 90 of these claims at 30% of the assessed amounts.

3.2.5 The Claims Handling Office has received 195 tourism-related claims totalling €25.2 million. One hundred and eighty-six of these claims have been assessed at a total of €13.2 million and interim payments totalling €3.7 million have been made at 30% of the assessed amounts in respect of 153 claims.

3.3 Portugal

In December 2003, the Portuguese Government submitted a claim for €3.3 million in respect of the costs incurred in clean-up and preventive measures. On the basis of additional documentation submitted in February 2005, the Portuguese Government increased its claim by €1 million. The

^{<2>} Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

claim was finally assessed at €2.2 million. The Portuguese Government accepted this assessment. In August 2006, the 1992 Fund made a payment of €328 488, corresponding to 15% of the final assessment (cf Annual Report 2006, pages 103-109). This payment does not preclude a further payment to the Portuguese Government in the event that the 1992 Fund Executive Committee were to increase the level of payments unconditionally.

4 Claims by the Spanish Government

4.1 Claims submitted

The Spanish Government submitted a total of 14 claims for an amount of €968.5 million. The claims by the Spanish Government relate to costs incurred in respect of at-sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments made in relation to the spill on the basis of national legislation and the costs incurred therein (Royal Decrees)^{<3>}, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns, costs incurred by local authorities and paid by the Government, costs incurred by 67 towns that had been paid by the Government, costs incurred by the regions of Galicia, Asturias, Cantabria and the Basque Country and costs incurred in respect of the treatment of the oily residues.

4.2 Payments to the Spanish Government

- 4.2.1 The first claim received from the Spanish Government in October 2003, for €83.7 million, was assessed on an interim basis in December 2003 at €107 million, and the 1992 Fund made a payment of €16.1 million, corresponding to 15% of the interim assessment. The 1992 Fund also made a general assessment of the total of the admissible damage in Spain and concluded that the admissible damage would be at least €303 million. On that basis, and as authorised by the Assembly, the 1992 Fund made an additional payment of €11.5 million, corresponding to the difference between 15% of €83.7 million or €57.6 million and 15% of the preliminarily assessed amount of the Government's claim, €16.1 million. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €11.5 million) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.
- 4.2.2 In March 2006 the 1992 Fund made an additional payment of €6.4 million^{<4>} to the Spanish Government, in accordance with the distribution of the amount payable by the 1992 Fund in respect of the *Prestige* incident, as authorised by the 1992 Fund Executive Committee at its October 2005 session (cf Annual Report 2006, pages 103-106).

4.3 Assessment of the claims

- 4.3.1 The claims by the Spanish Government, totalling €968.5 million, were provisionally assessed at €266.5 million. The 1992 Fund's experts have examined further documentation recently submitted in support of compensation payments made in relation to the spill on the basis of national legislation and have finalised the assessment of the costs incurred by one of the affected regions. As a consequence the total assessed amount for the claims submitted by the Spanish Government is now €287.7 million. A letter has been sent to the Spanish Government to communicate the latest assessment of their claims.
- 4.3.2 The reason for the difference between the claimed and assessed amounts in respect of the costs incurred in clean-up operations was that, applying the Fund's criteria of technical reasonableness, there was found to be a disproportion between the response carried out by the Spanish State and the

^{<3>} For details regarding the scheme of compensation set up by the Spanish Government reference is made to the Annual Report 2006, pages 109-111.

^{<4>} The Director was authorised to pay the Spanish Government €57 365 000 but, as requested by the Spanish Government, the 1992 Fund retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain.

pollution and threat thereof, as regards human and material resources and also as regards the extension in time of the operations.

- 4.3.3 Regarding the compensation payments made in relation to the spill on the basis of national legislation and tax relief for businesses affected by the spill, some of the payments had the character of aid and were paid to the population in the affected areas without consideration of the damage or losses suffered by the recipients of the payments. The tax relief was applied in a similar fashion. Applying the Fund's criteria, an assessment has been made of the losses suffered by the fisheries sector in Spain as a result of the incident.
- 4.3.4 The amount claimed by the Spanish Government includes VAT and, since the Government recovers the VAT, the corresponding amounts have been deducted from the claim.
- 4.3.5 Another reason for the difference between the claimed and assessed amount can be found in the claim for the removal of oil from the wreck for €109.2 million. At its February 2006 session, the 1992 Fund Executive Committee decided that some of the costs incurred in 2003, prior to the removal of the oil from the wreck, in respect of sealing the oil leaking from the wreck and various surveys and studies that had a bearing on the assessment of the pollution risk posed, were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (cf Annual Report 2006, pages 111-114). Following the Executive Committee's decision, the claim was assessed at €9.5 million.

5 Claims by the French Government

- 5.1 In May 2004 the French Government submitted claims for €67.5 million in relation to the costs incurred for clean up and preventive measures. The 1992 Fund and the London Club made a provisional assessment of the claims at €31.2 million. After the analysis of further documentation submitted by the French Government, the claims have been reassessed at €38.5 million and a letter explaining the assessment has been sent to the Government.
- 5.2 The amount claimed by the French Government includes VAT and, as in the claim by the Spanish Government, this amount has been deducted from the claim.
- 5.3 Part of the difference between the claimed and assessed amounts lies in the lack of sufficient supporting documentation for some items of the claim. Therefore it is possible that the assessed amount could increase if the French Government were to submit the required information. Other parts of the claim have been rejected for being not admissible according to the Fund's criteria.
- 5.4 A meeting took place in November 2009 between the Secretariat, its experts and the French Government, to discuss the assessment of the Government's claim. At the meeting, the Secretariat undertook to provide further details of the assessment to the French Government. As requested, a letter has been sent to the French Government providing a detailed breakdown of the assessment of the claim.

6 Legal proceedings in Spain

6.1 Criminal investigation

- 6.1.1 Shortly after the incident, the Criminal Court in Corcubión (Spain) started an investigation into the cause of the incident to determine whether any criminal liability could arise from the events. The Court was investigating the role of the Master, Chief Officer and Chief Engineer of the *Prestige* and of a civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.
- 6.1.2 In March 2009, the Criminal Court in Corcubión issued a decision declaring the instruction of the case as concluded. In the decision the Court exonerated from liability the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain and decided to continue the proceedings against the Master, Chief Officer and Chief Engineer of the *Prestige*.

- 6.1.3 Some of the parties to the criminal proceedings appealed against that decision, pleading that the Appeal Court declare the nullity of the Corcubión Court's decision in respect of the non-liability of the civil servant mentioned above. The French Government also appealed, pleading that some employees of the Classification Society that certified the *Prestige*, American Bureau of Shipping (ABS) should be incriminated and that proceedings should be initiated against them as well.
- 6.1.4 In October 2009, the Court of Appeal in La Coruña (Audiencia Provincial) overturned the Criminal Court's decision and ordered the Court to reinstate the proceedings against the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.
- 6.1.5 In May 2010 the Criminal Court in Corcubión declared the instruction of the case as concluded. It is expected that the hearing on the criminal and civil merits of the case will commence later in 2010 or in 2011.

6.2 Civil claims

- 6.2.1 Many claims for compensation submitted to the Criminal Court in Corcubión have been either withdrawn by the claimants following payments received from the Spanish Government or not accepted in principle by the Court since, in the Court's view, those claimants had not presented evidence of their condition as victims.
- 6.2.2 As at 7 May 2010, some 2 360 claims were pending in the legal proceedings before the Criminal Court in Corcubión (Spain). The documentation provided by the claimants is being examined by the experts engaged by the 1992 Fund.
- 6.2.3 Out of the above 2 360 claims, the Claims Handling Office has dealt with 497 claims, which are those that submitted documentation in the Court. The table below provides a breakdown of the different categories of claims:

Category of claim	No. of claims	Amount claimed €
Property damage	33	3 119 886
Clean up	3	1 765 788
Mariculture	52	125 344 939
Fishing and shellfish gathering	149	4 441 845
Tourism	10	607 556
Fish processors/vendors	160	14 345 149
Miscellaneous	90	8 761 885
Total	497	158 387 048

- 6.2.4 As at 7 May 2010, 245 of these claims had been assessed for €47 907. Interim payments totalling €3 480 have been made in respect of 22 of the assessed claims, at 30% of the assessed amount. Of the remaining claims, 187 have been rejected, 35 are awaiting response from the claimant and one is awaiting further documentation. The Claims Handling Office is progressing in the assessment of the remaining 252 claims.
- 6.2.5 The Spanish Government has taken legal action, not only on its own behalf but also on behalf of regional and local authorities and a number of other claimants or groups of claimants.

6.3 Court experts' report

- 6.3.1 The Criminal Court in Corcubión appointed Court experts to examine the civil claims lodged in the criminal proceedings. In January 2010, the Court experts submitted their report.
- 6.3.2 The experts engaged by the 1992 Fund are examining the report. They have preliminarily concluded that, in general, the Court experts have noticed the lack of supporting documentation submitted in

most claims. In their assessments the Court experts have not, in most cases, examined the link of causation between the damage and the pollution. In some cases, the amount assessed by the 1992 Fund is higher than the Court's experts' assessment due to the fact that the 1992 Fund's experts had more information available to them, allowing a more detailed assessment of the claims.

- 6.3.3 The 1992 Fund's experts are finalising the assessment of the civil claims submitted to the Criminal Court, in order to try to reach out of court settlements with claimants when possible and also in order to be ready to submit defence pleadings when the hearing commences.

7 Legal proceedings in France

- 7.1 Two hundred and thirty-two claimants, including the French Government, brought legal actions against the shipowner, the London Club and the 1992 Fund in 16 courts in France, requesting compensation totalling some €11 million, including €67.7 million claimed by the Government.
- 7.2 Forty-eight of these claimants have since withdrawn their actions, thus actions by 184 claimants remain pending in court for compensation claims amounting to a total of €90.6 million.
- 7.3 The courts have granted a stay of proceedings in 23 legal actions, either in order to give the parties time to discuss their claims out of court, or until the outcome of the criminal proceedings in Corcubión is known. One judgment was rendered in late October 2009 by the Civil Court in Bayonne (see below).
- 7.4 Some 162 French claimants, including various communes, have joined the legal proceedings in Corcubión, Spain.

8 Judgements by courts in France

Civil Court in Bayonne

Operator of two hotels and a spa

- 8.1 The operator of two hotels and a health spa in Biarritz submitted a claim, totalling €1 653 083 for losses suffered in 2003, allegedly due to the *Prestige* incident. The 1992 Fund assessed the claim at €398 193 and the claimant received an interim payment of €119 457.60, ie 30% of the assessed amount. The Fund based its assessment on the claimant's business results in 2000 and 2001, whereas the claimant had based the calculation of his losses on a provisional budget. After consideration of further information submitted by the claimant in support of the claim, the 1992 Fund reassessed the claim at €390 463. The claimant did not agree with the assessment and brought an action against the 1992 Fund for €1 653 083 for economic losses and for €500 000 for moral damage.
- 8.2 In a judgement rendered in October 2009 the Civil Court in Bayonne agreed with the 1992 Fund's assessment of the claim. In its judgement, the Court considered that the Fund's criteria for admissibility of claims contained in the 1992 Fund's Claims Manual, even if not binding for the national courts, was a reference and that the assessment of losses should not be based on projected figures but on the claimant's results in the periods before the incident compared with the affected period. Concerning the claim for moral damages, the Court considered that the claimant had not proved to have suffered damage beyond the economic losses suffered and that moral damages were not included in the definition of pollution damage contained in Article 1.6 of the 1992 Civil Liability Convention (1992 CLC).
- 8.3 At the date this document was issued the claimant had not yet appealed against the judgement.

9 Court action in the United States

9.1 Background information

9.1.1 The Spanish State has taken legal action against ABS before the District Court of First Instance in New York, requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million and later to exceed US\$1 billion. The Spanish State has maintained, *inter alia*, that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.

9.1.2 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that, if the State had suffered damage, this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident.

9.1.3 For details about the defence of sovereign immunity, discovery of the criminal file in Corcubión, financial records and e-mail communications, reference is made to the Annual Report 2007, pages 101 to 104 and the Annual Report 2008, pages 103 to 107.

9.2 ABS's defence that it acted as 'the pilot or any other person, (...), who performs services for the ship'

9.2.1 For details about ABS's request for a summary judgement and the opposition by the Spanish State, reference is made to the Annual Report 2008, pages 104 and 105.

9.2.2 In January 2008 the District Court accepted ABS's argument that ABS fell into the category of 'any other person who performs services for the ship' under Article III.4(b) of the 1992 CLC. The Court further ruled that, under Article IX.1 of the 1992 CLC, Spain could only make claims against ABS in its own courts and it therefore granted ABS's motion for summary judgement, dismissing the Spanish State's claim.

9.2.3 In its decision, the District Court also denied all pending motions as now being non-actionable, except for the pending motions over sanctions for Spain's failure to comply with the discovery requests relating to e-mails (cf paragraph 9.1.3).

9.2.4 The Spanish State appealed. ABS also filed an appeal against the Court's decision to dismiss its counterclaims for lack of jurisdiction. The Spanish State also filed a motion with the Court of Appeal seeking to dismiss ABS's appeal.

9.2.5 For details about the appeal by the Spanish State, its request that the Fund present an *amicus curiae* brief and ABS's counter appeal, reference is made to the Annual Report 2008, pages 104 to 105.

9.2.6 The Court of Appeal rendered its decision in June 2009, reversing both the dismissal of Spain's case and the dismissal of ABS's counterclaims, which the District Court had held did not fall under an exception to the Foreign Sovereign Immunities Act (FSIA).

9.2.7 With respect to Spain's claim, the Court of Appeal held that the 1992 CLC cannot divest a U.S. federal court of subject matter jurisdiction. However, in sending the case to the District Court, the Court of Appeal stated that the District Court may still exercise its discretion to decline jurisdiction based on *forum non conveniens* or principles of international comity. The Court of Appeal decision made the point that ABS' willingness to fully submit to jurisdiction in Spain was a relevant factor in any decision to decline jurisdiction. The Court of Appeal also pointed out that the District Court should consider the equities in declining jurisdiction at this advanced stage in the litigation process. If the District Court decided to retain jurisdiction, then the Court of Appeal has instructed it to conduct a conflict of laws analysis to determine which law should govern this case.

- 9.2.8 The Court of Appeal reinstated the original counterclaims by ABS that had been dismissed under the FSIA, holding that ABS's counterclaims did arise out of issues of duty and causation which were 'similar, if not identical' to the issues raised by Spain's claim.
- 9.2.9 The case has now been sent to the District Court Judge for further consideration.
- 9.2.10 Both parties have filed motions seeking a determination of the correct law to be applied to the case. Spain argues for U.S. law, noting that ABS is based in the U.S. and claiming that negligent and reckless policies and actions by the ABS offices in New York and Houston caused the loss of the *Prestige*. Alternatively, Spain seeks the application of Spanish law.
- 9.2.11 ABS maintains that Bahamian law, the law of the vessel's flag, should apply or, alternatively, the laws of China or the UAE, the countries where the last ABS surveys of the *Prestige* were carried out. In addition to moving for a determination of the correct law to be applied, ABS has also moved for summary judgment. ABS argues that: (a) if Bahamian law applies, then under the Bahamian Merchant Shipping Act, ABS is immune from suit as an agent of the Bahamian government and, (b) that the Bahamas, China, the UAE and Spain have all enacted the 1992 CLC, and that under Article III(4) it is immune from claims unless it acted with intent to cause damage or acted recklessly. Spain responds that neither the Bahamian Merchant Shipping Act nor Article III(4) of the 1992 CLC were intended to apply to classification societies and that, in any event, summary judgement is inappropriate in this case as it has adduced sufficient evidence to raise disputed material facts as to ABS' actions.
- 9.2.12 A hearing took place in May 2010 where both parties exposed their arguments summarised in paragraph 9.2.11. At the hearing ABS argued that it was the shipowner, not a classification society, who had a non-delegable duty to maintain a seaworthy vessel and that classification societies could not guarantee safety. ABS also argued that, on the point of liability of classification societies, all potentially applicable laws pointed to either no liability or to a standard of liability based on reckless negligence, that there was no evidence of reckless behaviour on the part of ABS and that unlimited liability, based on ordinary negligence, could destroy the international classification system. On the other hand, Spain argued that Spain's case was soundly based on recklessness by ABS in the performance of its duties. Spain argued that in general terms ABS was aware of certain deficiencies in its quality control programs that created risks especially in the case of older tankers that needed annual close-up surveys and that ABS, knowing these risks, did not take any steps to address the potential problems. Spain further argued that, had ABS taken steps to address those potential problems with older tankers, the *Prestige* would have been more closely examined.
- 9.2.13 It is expected the Court will render its decision in the near future.

10 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited:

- (a) to take note of the information contained in this document; and
 - (b) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.
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